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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON SEAN HOLMAN,

Defendant and Appellant.

B166575

(Los Angeles County
Super. Ct. No. MA025802)

MODIFICATION OF OPINION
AND DENIAL OF PETITION FOR
REHEARING

Our opinion, filed January 22, 2004, is modified as follows:

At the end of the last sentence on page 4 of the typed opinion, add the following footnote:

2. In his petition for rehearing, Holman complains that we applied the wrong standard of review. He is mistaken. As explained in *People v. Fulkman, supra*, 235 Cal.App.3d at page 561, the decision about whether there was a "choking" is a question of fact for the trial court that must be upheld on appeal if supported by substantial evidence. Although it is true that we exercise our independent judgment in determining whether the force used was constitutionally reasonable (*id.* at p. 562), the reasonableness of the force must

be considered in the context of the facts found by the trial court. For these reasons, the petition for rehearing lacks merit.

This modification does not affect the judgment.

The petition for rehearing is denied.

VOGEL (Miriam A.), J.

SPENCER, P.J.

MALLANO, J.